Supreme Court, U. S.
FILED
DEC 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1979

No. 79-888

HENRY E. BILLINGSLEY et ux.

Petitioners,

v.

JOHN H. MOORE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND

PETITIONERS BRIEF

HENRY E. BILLINGSLEY et ux.
9319 Old Georgetown Road
Bethesda, Maryland 20014

Petitioners

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1
OPINIONS BELOW 2
JURISDICTION 2
QUESTION PRESENTED 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
STATEMENT OF THE FACTS 3
ARGUMENT 6
CONCLUSION 10
APPENDIX:

A. Petition Docket #180, September Term, 1979 In the Court of Appeals of Maryland 1a
B. Order #1082, September Term 1978 Court of Special Appeals of Maryland 1b

TABLE OF AUTHORITIES

Cases:

Reeside v. Peter, 35 Md. 220 (1872) 8,9
Butler v. Daum, 245 Md. 447, 226 A.2d 261 (1967) 10
Waring v. Guy, 248 Md. 544, 237 A.2d 763 (1968) 10

Statutes and Constitutional Provisions:

5th Amendment, Federal Constitution 2
14th Amendment, Federal Constitution 2

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1979

No.

HENRY E. BILLINGSLEY et ux.

Petitioners,

v.

JOHN H. MOORE, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT
OF THE COURT OF APPEALS OF MARYLAND

PETITIONERS BRIEF

PRELIMINARY STATEMENT

Henry E. Billingsley et ux pray that the Writ of Certiorari issue to review a judgment of the Court of Appeals of Maryland entered on September 10, 1979 in the case styled Henry E. Billingsley et ux v. John H. Moore et al., No. 1082 September Term 1978.

OPINIONS

The decision of the court of Appeals of MARYLAND decided on September 10, 1979 is included herein as Appendix A. The decision of the Court of Special Appeals decided on June 19 is set forth herin as Appendix B.

JURISDICTION

The Jurisdiction of this Honorable Court to issue a Writ of Certiorari is grounded on 28 U.S. Code #1254.

QUESTION PRESENTED

DID THE COURT OF APPEALS OF MARYLAND VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION BY DENYING CERTIORARI AS THERE HAS BEEN NO SHOWING THAT REVIEW BY CERTIORARI IS DESIRABLE AND IN THE PUBLIC INTEREST.

CONSTITUTIONAL PROVISIONS INVOLVED

5th Amendment, Federal Constitution.
14th Amendment, Federal Constitution.

STATEMENT OF THE CASE

On September 10, 1979 The Court of Appeals of Maryland, upon consideration of a petition for certiorari to the Court of Special Appeals of Maryland denied the petition stating only that there has been no showing that review by certiorari is desirable and in the public interest. There is no other evidence of consideration by the Court on the merits.

STATEMENT OF THE FACTS

Petitioners had sought review of a decision of the Court of Special Appeals of Maryland dated June 19, 1979, dismissing an appeal from an Order of the Circuit Court for Harford Court, Maryland (Edward D. Higinbothom, Judge) dated Septemebr 1, 1978.

The mandate of the Court of Special Appeals was issued on June 19, 1979. (A previous opinion and mandate, issued May 17, 1979, were recalled and motion for reconsideration granted and opinion modified June 18, 1979.)

A Deed of Trust was sought to be foreclosed in these proceedings which was a second Deed of Trust as to the principal improvements therein conveyed, being a large mansion house known as Mount Felix, situated on the highest elevation overlooking the City of Havre de Grace, Maryland with a commanding view of the mouth of the Susquehanna River and the upper reaches of Chesapeake Bay.

On or about June 20, 1977, the Trustees in this case sought to commence foreclosure proceedings by filing

an Order to Docket Case, the original Deed of Trust Note and Statement of Mortgage Indebtedness. They did not, however, file the original or a certified copy of the Deed of Trust sought to be foreclosed, in accordance with the requirements of Maryland Rule W72 c, and it therefore appears that the Court was without jurisdiction over the mortgaged property, as provided by Maryland Rule W72 f, when the action was docketed.

Notwithstanding their lack of jurisdiction to proceed, the Trustees proceeded to advertise the mortgaged property in violation of Maryland Rule W74 a2(a) for public foreclosure sale on July 12, 1977, but their attempted sale was enjoined by the Court on the petition of the mortgagor, Henry E. Billingsley.

Subsequently, the injunction to stay the foreclosure sale was dissolved, an original Deed of Trust having been filed in these proceedings, the Trustees secured an Order of Court to proceed and again proceeded to advertise the mortgaged property for public sale on Monday, September 12, 1977, without, however, any regard to the objections previously stated to the advertisement of sale as previously published in the injunction proceedings. Upon the completion of this sale, Exceptions were filed by the Mortgagor in which objection was made because of the inadequacy of price and also the failure of the Trustees to adequately advertise the property sold. In addition, objection to the sale was interposed by the mortgagor, and later also by the foreclosure purchaser because, pursuant to the instructions of the Trustees, or their attorney, the auctioneer misrepresented the condition of the title to the acreage adjoining the mansion house as being free

and clear of all liens and encumbrances, whereas it was in fact subject to a covenant running with the land restricting it to use for agricultural purposes.

Notwithstanding all of the aforegoing, and also the provisions of Maryland Rule W74 f, which provides that if a sale is set aside by the Court "a resale may be ordered to be made by the person who made the previous sale, or the court may appoint a special trustee to make such sale," the Trustees did not attempt to secure such order, as they had previously done, but soon thereafter began to readvertise the property for sale on March 28, 1978, again without any substantial change in the wording of the advertisement. On this occasion, instead of a gross bid of approximately $120,000.00 ($70,000.00 plus the first trust obligation), the Trustees received a bid of only $20,000.00 above the first trust, alleged by them to have grown at this point to the sum of approximately $60,000.00, or a gross price for the property of approximately $80,000.00. A real estate dealer with over 30 years experience in Harford County testified the property was worth at least $175,000.00 The bid was made by the mortgagee.

Upon the principal grounds that the Trustees were without authority to make the resale without an order of the Court, and also the improper advertising and grossly inadequate price secured for the property, the mortgagor filed Exceptions which were the subject of a hearing before the Circuit Court for Harford County (Higinbothom, Edward D., J.). Upon consideration of the testimony the Court ratified the sale upon the condition that the purchaser, who happened to be also

the mortgagee, would waive his right to a deficiency judgment against the mortgagor in an approximate amount of upwards of $40,000.00. Upon the filing of such waiver by the mortgagee on August 30, 1978, the Court on September 1, 1978, passed the final Order of Ratification from which appeal was taken.

ARGUMENT

THE STATE COURT OF APPEALS VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION BY DENYING CERTIORARI ON THE GROUNDS THERE HAD BEEN NO SHOWING THAT REVIEW BY CERTIORARI WAS DESIRABLE AND IN THE PUBLIC INTEREST.

The case tests the adequacy and fairness of the appeals process in the state of Maryland in the face of the precious substantive rights guaranteed the petitioners under the Federal Constitution.

The Maryland Court of Appeals should have recognized the inadequacy of the decision of the Court of Special Appeals in the first instance in evading a substantive decision on the minor technical ground of the availability of the printing of the advertisement when it was clearly present for all to examine including the Court.

The Federal questions were implicit in this action of the lower court but were not raised by the petitioners in their petition for certiorari to the highest Maryland

Court because of the strength of the questions governing state foreclosure law which were raised.

When, however, the Maryland Court of Appeals acted so summarily by electing to ignore the clear public interest shown by the petitioners in their quest for certiorari, the petitioners could only resort for the first time to challenge the constitutionality of the decision of the Maryland Court of Appeals on both grounds of lack of due process and equal protection of the laws.

It seems obvious that if there is an underlying reason for Maryland Rule W74 f, it is the reason that the Courts have perceived the possibility of gross abuses of the rights of mortgagors where mortgaged property is offered for public sale.

Without the requirement that Trustees under a Deed of Trust secure authority to conduct a resale, there is nothing to prevent property from being resold in a defective manner, two or three times, so as to reduce the price bid for the property (except, of course, the presumably good intentions of the Trustee). Such good intentions are unlikely to be implied by the Mortgagor, since the Trustees under a Deed of Trust in the nature of a mortgage are likely to be selected by the Mortgagee.

Other abuses are quite as easy to conceive, arising from a situation where repeated defective sales can be made, without check upon the Trustees, such as, increased advertising and auctioneering expenses incurred, bond premium renewals, and the like, over which the mortgagor, unless he is possessed of ample funds (which would obviously not be the normal situation, since the foreclosure presupposes a failure to

meet financial obligations would be powerless to prevent, since the securing of an injunction to stay foreclosure proceedings requires a satisfaction or reinstatement of the mortgage indebtedness.

The case at bar is an apt illustration of how an unchecked series of trustees' sales can get out of hand. The first attempted sale by the Trustees, advertised without any jurisdiction to proceed and contrary to the express prohibition of the Rules, was enjoined by the mortgagor.

Thereafter, the secondly attempted trustees' sale of September 12, 1977, was successfully objected to by both the mortgagor and the foreclosure sale purchaser in separately filed Exceptions. The Exceptions filed by the mortgagor, and sustained by the Court set out in considerable detail the defects in the advertisement of sale, which objections were totally ignored by the Trustees, and the advertisement for the resale of March 28, 1978, without any substantive change in wording, was again excepted to. The ratification of this sale was then the subject of appeal.

It seems perfectly clear that if the Trustees had petitioned the Court for authority to conduct the resale in accordance with the cited rule, and had given notice of their proposed action to the mortgagor's attorney, an opportunity would have been presented to the mortgagor and the Court to require that the advertisement of sale fairly describe the property being sold, and that the complaints of the mortgagor, at the very least, be given a fair hearing and consideration by the Trustees.

The case of *Reeside v. Peter*, 35 Md. 220 (1872),

cited in the Opinion of the Lower Court as permitting a resale by the Trustees without Court order was decided long before the promulgation of the Maryland Rules. It can certainly be distinguished, on the facts, from the case at bar.

The property sold at public judicial sale in the within proceedings has been known in Harford County for generations as "Mount Felix." Mount Felix has served as a point of reference for navigation of the Chesapeake Bay for almost two hundred years and is noted on the Federal hydrographic chart of Chesapeake Bay. It is also an official historical site in the Maryland Historical Trust. No mention is made of any of these features in the advertisement of sale for the property in question, which simply locates the property as "2000 Level Road, Havre de Grace, Maryland."

The Lower Court (Higinbothom, J.) specifically took judicial notice of the advertisement of sale and its omission of the popular name of the property in question. The case of *Reeside v. Peter, et al.*, 33 Md. 220 (1872), held that the mortgaged property would have to be resold, where the advertisement in a foreclosure sale omitted the popular name of the property sold.

Under the circumstances, the Appellants feel that they have met the burden of overcoming the presumed validity of the sale in question by showing that the omissions from the advertisement of sale were prejudicial to its sale for a fair and adequate price, since the bid that was eventually made by the mortgagee was less than one-half of the reasonable price of the property as testified to by a local appraiser, after the previous sales had been enjoined and set aside because

of errors on the part of the Trustees and without any attempt on their part to remedy the defects in the advertisements of sale, which were brought to their attention. Appellants believe that they have met the standards required by the ruling of the Court in *Butler* v. Daum, 245 Md. 447, 226 A.2d 261 (1967) and *Waring v. Guy*, 248 Md. 544, 237 A.2d 763 (1968).

The Appellants believe that a sale under the circumstances outlined, which results in a price less than one-half the reasonable value of the property, under the facts and circumstances in this case, was such as must shock the conscience of the Court.

To deny certiorari so perfunctorily from so harsh an adverse decision is a singular disservice to the home owning public in the state of Maryland and elsewhere in the nation.

The error is compounded by denial of due process and equal protection of the laws under the Constitution.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the demands of public policy and justice require in this case that a Writ of Certiorari should be granted and the judgment in this case reversed.

Respectfully submitted,

HENRY E. BILLINGSLEY et ux
9319 Old Georgetown Road
Bethesda, Maryland 20014
Petitioners

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 180
September Term, 1979

(No. 1082, September Term, 1978
Court of Special Appeals)

HENRY E. BILLINGSLEY et ux.

v.

JOHN H. MOORE et al.

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy
ROBERT C. MURPHY
Chief Judge

Date: September 10, 1979.

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 1082

September Term, 1978

HENRY E. BILLINGSLEY, et ux.

v.

JOHN H. MOORE, et al.

Gilbert, C. J.
Thompson
Mason,
JJ.

PER CURIAM

Filed: June 19, 1979

This is an appeal from an order passed by the Circuit Court for Harford County (Edward D. Higinbothom, J.) ratifying a trustee's sale of real estate. The appellants,

Henry E. Billingsley and wife, raise two questions:

> "1. The trustees named in a deed of trust are not entitled, without securing authority from the court pursuant to Rule W74, §f, to conduct a resale after a prior sale has been set aside by the court under the facts and circumstances of this case.
>
> "2. The omission of principal descriptive matters from the published advertisement of sale, coupled with misleading elements of the address of the property sold was prejudicial to the sale of the property in question at a fair and adequate price."

The appellants argue under Md. Rule W74, §f it was incumbent upon the trustees to secure authorization of the court before proceeding to readvertise the property for sale when a preceding sale had been set aside by the court. In construing a similar statute which preceded Md. Rule W74 the Court held an order of court was not necessary. *Reeside v. Peter*, 35 Md. 220 (1872). The appellants further argue that the advertisement of sale was not proper but they did not include in the Record Extract a copy of the advertisement of sale.

It is apparent that we cannot decide the latter question without reading the document to which we have referred. We, therefore, dismiss the appeal for reasons fully set out in *Eldwick Homes Association, Inc. v. Pitt*, 36 Md. App. 211, 212-213, 373 A.2d 957, *cert. denied*, 281 Md. 736 (1977), as follows:

"Md. Rule 1028(b)(1) provides:

> 'The printed extract shall contain such parts of the record as may reasonably be necessary for the determination of the questions presented by the appeal, and shall include:

'(a) The judgment appealed from, together with the opinion or charge of the lower court, if any.

'(b) So much of the evidence, pleadings or other parts of the record as is material to any question the determination of which depends upon the sufficiency of the evidence, pleadings or other matter contained in the record to sustain any action ruling, order or judgment of the lower court.

'(c) Such other parts of the record as may be designated by the parties pursuant to section c. of this Rule.'

"In a not dissimilar case, *Prime Contractors, Inc. v. Mayor of Baltimore*, 241 Md. 55, 215 A.2d 214 (1965), the Court of Appeals dismissed an appeal where the appellant's appendix did not comply with Md. Rule 828, which is almost identical to Md. Rule 1028. In *Prime*, the Court said:

'The appellant's appendix consists merely of the resolution of the Board of Municipal and Zoning Appeals and the opinion of Judge Cullen, and does not include any of the testimony of the witnesses presented to the Board or the exhibits and plats that were in evidence before the Board. This Court has repeatedly dismissed appeals where an appellant's record extract or appendix was patently insufficient for a determination of the questions raised.' (Citations omitted.) 241 Md. at 57, 215 A.2d at 216.

* * * *

"We are unable to distinguish any difference between the *Prime* case and the case now before us. Inasmuch as Md. Rule 828 as interpreted by the Court of Appeals requires dismissal and under the circumstances that Md. Rule 1028 is sub-

stantially the same and differs only in that it is made applicable to this Court, we believe we are compelled to follow the lead of the Court of Appeals in *Prime* and *Platt* and dismiss the appeal."

For whatever solace it may be to counsel, we would have affirmed the order of ratification if we had considered the case on the merits.

APPEAL DISMISSED.
APPELLANTS TO PAY THE COSTS.
MANDATE TO ISSUE FORTHWITH